TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 436.

CHARLES L. BENEDICT, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 30, 1899.

(17,549.)

(17.549.)

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INDEX.

	Original.	Print.
Petition and amended petition	1	1
Traverse	6	3
Findings of fact and conclusion of law	7	4
Opinion of the court	8	5
Judgment of the court	10	7
Application for and allowance of appeal	11	8
Certificate of clerk	12	8

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1899.

1 In the Court of Claims.

CHARLES L. BENEDICT
vs.
THE UNITED STATES. } No. 21156.

I.—*Petition and Amended Petition.*

On the 28th day of September, A. D. 1898, the claimant filed his original petition, and on April 20, 1899, in lieu of said original petition, by leave of court, he filed his amended petition, which is as follows:

Amended Petition.

To the honorable the justices of the United States Court of Claims:

Charles L. Benedict, the plaintiff herein, respectfully represents:

First. He is a citizen of the United States, of lawful age and resides at Dongan Hills, Staten island, in the city of New York and in the State of New York.

Second. That in the month of April, 1865, he was duly appointed by the President of the United States judge of the district court of the United States for the eastern district of New York.

Third. That he duly entered upon the duties of said office and duly performed the same until the year 1897, during which and on or about the 20th of July, 1897, he resigned his office, having
2 then held his commission as judge of said court for more than ten years, and having attained the age of seventy and upwards.

Fourth. That on the 7th day of February, 1873, the Congress of the United States passed an act as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That additional terms of the circuit court of the United States for the southern district of New York shall hereafter be held in each year, commencing as follows: On the second Wednesday of January, on the second Wednesday of March, on the second Wednesday of May, on the third Wednesday of June, on the second Wednesday of October, and on the second Wednesday of December. The holding of any of the above-mentioned terms shall not dispense with or affect the holding of any other term of the court at the same time, nor shall the pending of any other term of the court prevent the holding of any of the terms hereby appointed.

"SEC. 2. That the terms hereby appointed shall be devoted exclusively to the trial and disposal of the criminal cases and matters arising and pending in said court. The terms of said court appointed by this act may be held by the circuit judge of the second judicial circuit and the district judges for the southern and eastern districts of New York, or any one of said three judges; and at every such term held by said judge of said eastern district he shall receive the sum of three hundred dollars, the same to be paid in the

manner now prescribed by law for the payment of the expenses of another district judge while holding court in said district."

3 That thereafter, on the passage of the Revised Statutes of the United States, the provisions of the said act of February 7th, 1873, were embodied in section 658 of the Revised Statutes, which provides as follows:

"SECTION 658. The regular terms of the circuit courts shall be held in each year at the times and places following. * * * In the southern district of New York at the city of New York * * * exclusively for the trial and disposal of criminal cases and matters arising and pending in said court, on the second Wednesday in January, March and May, on the third Wednesday in June, on the second Wednesday in October and December;" and also in the 613th section of said Revised Statutes, which provides as follows: "The terms of the circuit court for the southern district of New York appointed exclusively for the trial and disposal of criminal business may be held by the circuit judge of the second judicial court and the district judges for the southern and eastern districts of New York, or any one of said three judges, and at every such term held by the said judge of said eastern district he shall receive the sum of $300, the same to be paid in the manner now prescribed by law for the payment of the expenses of another district judge while holding court in said district."

Fifth. That since the passage of said act of 1873, the plaintiff has held, under the provisions of that act and of the Revised Statutes above referred to, those six terms of the circuit court of the United States, for the southern district of New York, in every year, and has received as his salary for holding said terms the sum of $1,800 in each year.

4 Sixth. And the plaintiff further alleges that during the year previous to his resignation as above stated he received the said salary of $1,800 for that year, which was payable to him by law for said judicial services, and also the salary of $5,000 payable by law for the judicial services rendered by him in the eastern district as provided by the act of Congress of February 24, 1891 (26 Stats. at L., p. 783).

Seventh. And the plaintiff further alleges that the 714th section of the Revised Statutes of the United States provides as follows: "When any judge of any court of the United States resigns his office after having held his commission as such at least ten years, and having attained the age of seventy years, he shall during the residue of his natural life receive the same salary which was by law payable to him at the time of his resignation."

Eighth. And the plaintiff further alleges that during the year previous to his resignation he received from the United States as compensation for his judicial services the sum of $6,800 which was the salary which was by law payable to him during that year, and at the time of his resignation.

5 Ninth. And the plaintiff further alleges that he has not received during the period since his resignation the same salary which was by law payable to him at the time of his resigna-

tion, but he has only received at the rate of $5,000 per year, part of the salary so by law payable to him, which part has been received by him without prejudice to the claim which he makes herein.

Tenth. And the plaintiff further alleges that he has presented to the auditor of the State and other departments a bill for the amount of his salary for one year so remaining due and unpaid, and made claim on the said auditor for the payment of such bill, but said auditor has refused to audit or approve the said bill, and the said remainder of the plaintiff's said salary still remains due and unpaid to him, with interest from the 20th day of July, 1898.

Wherefore the plaintiff claims from the United States the sum of $3,150, with interest, and prays that judgment be entered against the United States in favor of the plaintiff for the sum of $3,150, with interest on $1,800 from the 20th day of July, 1898, and the costs of this suit, and that process issue therefor, and that plaintiff may have such other and further relief as the court in the premises may consider equitable and just.

CHAS. L. BENEDICT.

R. D. BENEDICT,
Attorney for Petitioner.

STATE OF NEW YORK, }
Eastern District of New York. }

I do solemnly swear that I have read the foregoing amended petition by me subscribed and know the contents thereof, and the facts therein stated upon personal knowledge are true, and those stated upon information and belief I believe to be true, and that the sum herein claimed is justly due to me from the defendant, exclusive of all set-offs and all just grounds of defence.

CHAS. L. BENEDICT.

Subscribed and sworn to before me this 14 day of April, 1899.
B. LINCOLN BENEDICT,
[SEAL.] *U. S. Commissioner.*

6 II.—*Traverse.*

Term 1898–1899.

CHARLES L. BENEDICT
v.
UNITED STATES. } No. 21156.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

L. A. PRADT,
Ass't Att'y General.

Filed March 16, 1899.

7 III.—*Findings of Fact and Conclusion of Law.*

This case having been heard by the Court of Claims, the court find the facts (as agreed to by the parties) to be as follows:

First. The petitioner, Charles L. Benedict, is a citizen of the United States, of lawful age, and resides at Dongan Hills, Staten island, in the city of New York, and State of New York.

Second. In the month of April, 1865, the petitioner was duly appointed by the President of the United States judge of the district court of the United States for the eastern district of New York.

Third. The petitioner duly entered on the duties of his office, and duly performed the same until the year 1897, during which, and on or about the 20th of July, 1897, he resigned his office, having then held his commission as judge of said court for more than ten years, and having attained the age of 70 and upward.

Fourth. Since the passage of the act of February 7, 1873, the petitioner has held, under the provisions of that act, and of the Revised Statutes, to wit, sections 613 and 658 of the Revised Statutes, the six terms of the circuit court of the United States for the southern district of New York, referred to in said statutes, in every year, and has received for holding each of said terms the sum of $300; the same being paid to him by the United States marshal for the southern district of New York, pursuant to sections 613 and 597, Revised Statutes.

Fifth. That the same was paid upon a voucher in substance as follows:

"UNITED STATES OF AMERICA, }
Southern District of New York. }

I, Charles L. Benedict, district judge of the eastern district of New York, hereby certify that I have held the circuit court of the United States for the southern district of New York at the — term thereof, provided for by section 613 of the Revised Statutes of the United States, and that I am entitled to receive therefor the sum of $300, as provided in said section.

(Signed) CHARLES L. BENEDICT
(and dated)."

"Received of —— ——, United States marshal for the southern district of New York, the sum of $300 in full of the above account.

(Signed) CHARLES L. BENEDICT."

The total amount thus paid annually to the plaintiff was $1,800.

Sixth. That such payments to the petitioner by the marshal were from time to time allowed in the marshal's accounts and paid to him out of the appropriations for defraying the expenses of the courts of the United States.

Seventh. During the year previous to the petitioner's resignation he received the said $1,800 for that year, in accordance with the provisions of sections 613, 597, and 658, Revised Statutes, as above

set forth, and also the salary of $5,000, payable to him, as provided by the act of Congress of February 24, 1891 (26 Stat. L., 783), out of the appropriation to pay the salaries of district judges of the United States.

Eighth. During the year since his resignation petitioner has only received as salary the sum of $5,000, which sum has been received by him without prejudice to the claim which he makes in this proceeding.

Ninth. The petitioner presented to the auditor of the State and other departments a bill for the amount of his salary claimed by him herein to be remaining due and unpaid, and made claim on the auditor for the payment of said bill, but the auditor refused to audit or approve the said bill, and no part of the said $1,800 has been paid to him.

January 7, 1899.

ROBERT D. BENEDICT,
Attorney for Claimant.
L. A. PRADT,
Assistant Attorney General.

Conclusion of Law.

Upon the foregoing facts the court find as conclusion of law that the petition should be dismissed.

8 IV.—*Opinion of the Court.*

DAVIS, J., delivered the opinion of the court:

After long, faithful, and distinguished service as judge of the district court of the United States for the eastern district of New York, the plaintiff, July 20, 1897, availed himself of the privilege of the retiring act, and has since received the salary of district judge (sec. 714, R. S.).

The question now presented is as to the sum of $1,800 a year in addition to the stated salary for the judge of the eastern district, which, in fact, at the time of his retirement Judge Benedict was receiving for services performed in the district court for the southern district of New York; this in addition to his duties in the eastern or Brooklyn district.

It appears that plaintiff was appointed judge of the district court of the United States for the eastern district of New York in April, 1865; that he performed the duties of this office until July, 1897, when, having the right thereto under the statute, he retired.

Section 714 of the Revised Statutes provides that "when any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation."

Judge Benedict is in a position peculiar to the particular office he

held, and he claims that by reason of this exceptional position he is entitled to larger payment from defendants than the simple salary of a district judge.

Congress (act 7 February, 1873) directed that certain additional terms of the circuit court (southern district of New York) should be held, which should "not dispense with or affect the holding of any other term of the court at the same time," these terms to be devoted to "criminal matters." It was further provided in the act that these terms might "be held by the circuit judge of the second judicial circuit and the district judges for the southern and eastern districts of New York, or any one of said three judges; and at every such term held by said judge of said eastern district he shall receive the sum of three hundred dollars, the same to be paid in the manner now prescribed by law for the payment of the expenses of another district judge while holding court in said district." Sections 658 and 613, Revised Statutes, also relate to the matter under consideration. Section 658, "The regular terms of the circuit court shall be held in each year at the times and places following: * * * In the southern district of New York, at the city of New York, * * * exclusively for the trial and disposal of criminal cases and matters arising and pending in said court, on the second Wednesday in January, March, and May; on the third Wednesday in June; on the second Wednesday in October and December."

Section 613 (Rev. Stat.) prescribes that: "The terms of the circuit court for the southern district of New York, appointed exclusively for the trial and disposal of criminal business, may be held by the circuit judge of the second judicial circuit and the district judges for the southern and eastern districts of New York, or any one of said three judges, and at every such term held by the said judge of said eastern district he shall receive the sum of three hundred dollars, the same to be paid in the manner now prescribed by law for the payment of the expenses of another district judge while holding court in said district."

For twenty-four years Judge Benedict held these terms and received the compensation thus provided by statute, to wit, $1,800 a year; this in addition to his salary as judge of the eastern district.

It is now urged that under section 714, Revised Statutes (which provides that a retiring judge shall receive "the same salary which was by law payable to him"), the plaintiff may be paid not only the $5,000 per annum as district judge, sitting in the eastern district of New York, but also the $1,800 specified in this section (613) of the Revised Statutes. The question is thus clearly and tersely stated by plaintiff's counsel: "Was this $1,800, paid to Judge Benedict yearly for twenty-four years, and provided for by section 613, a part of his salary which was by law payable to him?"

9 It is urged that "the same salary which was by law payable to him" means the salary received by the judge for judicial services during the year previous to his resignation; or, if it mean not that, it must mean "the salary he would have received during the year after the date of his resignation if he had not resigned."

The retired judge is to receive the salary payable to him by law as the law existed at the date of his retirement. But it is salary he is to receive, not emoluments; salary, simply; the salary of the office which he yields The question presented is absolutely exceptional; its decision can affect the district judge of the Brooklyn district alone.

Was this $1,800 a year salary? The important element of salary is certainty of amount in relation to duration of time. Severity of duty, of responsibility, or of labor have no relation to receipt of salary, although these elements control the minds of those who fix the amount of salary. Because of this certainty of receipt, salary is usually relatively low for the class of service required.

As judge of the eastern district, sitting in that district, Judge Benedict, without condition as to amount of business or length of terms, was entitled to a salary certain. As to his services in the southern district there were contingencies: In the first place the term of the circuit court in the southern district for criminal business "may" be held by the district judge of the eastern district—not "must" be held; on the contrary, it may as well be held by either the circuit judge of the second judicial court or the district judge for the southern district. The only distinction made by the law is that if the judge of the eastern district hold the court he shall receive extra compensation, to which the others are not entitled; but this is contingent upon the fact that he in fact do hold the court. If ill and unable to hold his court in the eastern district, this plaintiff's salary would run; if ill and unable to attend in the southern district he would not receive the compensation to that service allotted, for the statute provides pay only for the judge of the eastern district who in the southern district holds a term. That is, the extra pay is for extra work in fact performed. This pay does not attach to the office of judge of the eastern district, but he becomes entitled to it only because he actually holds the term.

We do not think that this extra compensation was part of the salary "by law payable" to Judge Benedict when he retired. Therefore the petition will be dismissed.

10 V.—*Judgment of the Court.*

CHARLES L. BENEDICT
vs.
UNITED STATES. } No. 21156.

At a Court of Claims, held in the city of Washington, on the 16th day of October, A. D. 1899, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of Charles L. Benedict, claimant, be dismissed.

BY THE COURT.

11 VI.—*Application for and Allowance of Appeal.*

From the judgment rendered in the above-entitled cause on the 16th day of October, 1899, in favor of the defendants, the claimant, by his attorney, on the 16th day of October, 1899, makes application for and gives notice of an appeal to the Supreme Court of the United States.

ROBERT D. BENEDICT,
Attorney for Petitioner, 68 Wall Street, New York City.

Filed October 16, 1899.

At a Court of Claims, held October 16, 1899, on motion of claimant's attorney, it was ordered that said application for appeal be allowed as prayed for.

BY THE COURT.

12 In the Court of Claims.

CHARLES L. BENEDICT
vs.
THE UNITED STATES. } No. 21156.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment of the court dismissing the petition, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington city, this 26th day of October, A. D. 1899.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No., 17,549. Court of Claims. Term No., 435. Charles L. Benedict, appellant, *vs.* The United States. Filed October 30th, 1899.

No. 435.

OFFICE SUPREME COURT U. S.
FILED
DEC 30 1899
JAMES H. MCKENNEY, Clerk

Brief of Benedict for Appt.
United States Supreme Court.
Filed Dec. 30, 1899.

(No. 435.)

CHARLES L. BENEDICT,
Petitioner and Appellant,

vs.

THE UNITED STATES.

Brief and Points for Appellant.

ROBERT D. BENEDICT,
Counsel for Appellant,
68 *Wall Street,*
New York City.

NEW YORK:
C. H. JONES & CO., PRINTERS, 114 FULTON STREET.
1899.

United States Supreme Court.

CHARLES L. BENEDICT,
Petitioner and Appellant,

vs.

THE UNITED STATES.

No. 435.

Brief and Points for Appellant.

The question involved in this case, is whether the Petitioner, who resigned his position as Judge of the United States for the Eastern District of New York, on the 20th day of July, 1897, shall, by reason of that resignation, lose $1,800 a year for the rest of his life, *or* receive from the United States the same compensation which had been for over twenty years paid him for his judicial services.

Before and at the time of his resignation, Judge Benedict was paid at the rate of $6,800 a year for his judicial services. Since his resignation he has been paid only $5,000 a year; and this petition was presented to the Court of Claims in order to obtain an adjudication that he is entitled to be paid the additional sum of $1,800 a year. That court dismissed the petition and the Petitioner appeals.

FIRST POINT.

The question arises under the provisions of the Statutes of the United States relating to the Courts of the United States in New York. It is a question which has never arisen before and which can only arise on the resignation of a Judge of the Eastern District of New York.

And it is purely a question of the construction of Statutes.

SECOND POINT.

The Revised Statutes of the United States, Sec. 714, provide that, "When any Judge of any Court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall during the residue of his natural life receive the *same salary* which was by law payable to him at the time of his resignation."

The Act of February 24, 1891, 6 Stat. at L., p. 783, provides that the "salaries of the several Judges of the District Courts of the United States shall hereafter be at the rate of $5,000 per annum."

If there were no other section of the Statutes which applied to the case, the question in this case would not arise.

But the Act of February 24, 1891, is not the only Statute to be considered. Congress has passed Statutes which have a special application to the Judge of the Eastern District of New York, and it is under those Statutes that this question arises.

The provisions of those Statutes which bear upon this question are as follows:

On the 7th day of February, 1873, Congress passed an Act as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in

Congress assembled, that additional terms of the Circuit Court of the United States for the Southern District of New York shall hereafter be held in each year, commencing as follows: on the second Wednesday of January, on the second Wednesday of March, on the second Wednesday of May, on the third Wednesday of June, on the second Wednesday of October, and on the second Wednesday of December. The holding of any of the above mentioned terms shall not dispense with or affect the holding of any other term of the court at the same time, nor shall the pending of any other term of the court prevent the holding of any of the terms hereby appointed.

"Sec. 2. That the terms hereby appointed shall be devoted exclusively to the trial and disposal of the criminal cases and matters arising and pending in said court. The terms of said court appointed by this Act may be held by the Circuit Judge of the second judicial circuit and the district judges for the Southern and Eastern Districts of New York, or any one of said three judges; and at every such term held by said judge of said Eastern district he shall receive the sum of three hundred dollars, the same to be paid in the manner now prescribed by law for the payment of the expenses of another district judge while holding court in said district."

On the passage of the Revised Statutes of the United States, the provisions of that Act of February 7th, 1873, were embodied in Sections 658 and 613 of the Revised Statutes, as follows:

"Section 658. The regular terms of the Circuit Courts shall be held in each year at the times and places following. * * * In the Southern District of New York at the City of New York * * * exclusively for the trial and disposal of criminal cases and matters arising and pending in said court, on the second Wednesday in January, March and May, on the third Wednesday in June, on the second Wednesday in October and December."

"Section 613. The terms of the Circuit Court for the Southern District of New York appointed exclusively for the trial and disposal of criminal business may be held by the Circuit Judge of the Second Judicial Court and the District Judges for the Southern and Eastern Districts of New

York, or any one of *said three* judges, *and at every such term held by the said Judge of said Eastern District he shall receive the sum of* $300, *the same to be paid in the manner now prescribed by law for the payment of the expenses of another District Judge while holding court in said Dtstrict.*"

Since the passage of that Act in February, 1873, *for twenty-four years*, those terms were held by Judge Benedict who was the Judge of the Eastern District, and he received as compansation therefor the sum of $1,800, as provided by law, every year.

And the question is whether, under the 714th Section of the Revised Statutes which provides for a retiring Judge receiving "the same salary which was by law payable to him," Judge Benedict is entitled to receive not only the $5,000 provided for in the Act of 1891, but also this $1,800 provided for by Section 613 of the Revised Statutes.

In other words the question is this, "Was this $1,800, paid to Judge Benedict yearly for twenty-four years, as provided for by Section 613, a part of his *salary payable by law?*"

THIRD POINT.

What is "salary payable by law" to a Judge at the time of his resignation? There can be but one answer, it means the salary which he received for his Judicial services during the year previous to his resignation.

a It must mean that, or it must mean the salary which he would have received during the year after the date of his resignation, if he had not resigned.

b It is sufficient to show that the latter meaning cannot be the true one, if we suppose that within the year after his resignation, Congress had amended the Act of 1891, and provided that the salaries of the District Judges should be $7,000 per annum. In that case, if the Judge had not resigned, he would have received that increased

sum. But, plainly, he could not be entitled to that increased sum after his resignation. That sum would not be the salary payable by law to him *at the time of his resignation.*

c Nor can that phrase "at the time of his resignation" mean "at the instant of his resignation," or "on the day of his resignation." He might have nothing whatever payable to him on that day, but no one would think that he was therefore entitled to *nothing* thereafter.

d Hence it follows that the "salary which was by law payable to him at the time of his resignation," means the salary which became due and payable to him before. It means the salary which he actually received for the year before he resigned.

e And there is no question that Judge Benedict did receive, during the year before his resignation, as compensation for his Judicial services the sum of $6,800.

Unless therefore it can be held that there is a difference between "compensation for Judicial Services" and "Judicial Salary," it follows that the Judge's salary was $6,800, and that that is the sum which he is entitled by the Statute to receive every year "during the residue of his natural life."

FOURTH POINT.

The payment of that $1,800 a year to the Judge for twenty-four years has been the payment of a sum "payable by law," by express Statute.

If therefore it is included in the term "salary," it is included in the phrase, "Salary payable by law at the time of his resignation."

And here I beg leave to ask, if the sum, thus paid to the Judge every year, was not "salary," *what was it?*

I maintain that under the reason of the law, the word "salary" should include this compensation for Judicial service; that no definition of the word can be found which will exclude it; and that Congress has put an interpretation on the word, which necessarily *includes it.*

FIFTH POINT.

The proper rule of Construction of this Statute was declared by the Attorney General of the United States in 21 Op. of Atty. Gen., p. 450, as follows:

"The objects of this Statute are not such as sometimes lead to *a strictness of construction which makes the turn of every phrase a justification for reluctance to believe that a meaning was intended, which has not been clearly and unequivocally expressed.* On the contrary, there is no reason why this statute should not be fairly construed, reading its terms in the light of the manifest object and purpose of Congress.

The object was to further the good of the public service by providing for the retirement, at full pay, of judges who have reached the age of seventy and been ten years on the bench. The expression 'any judge of any court of the United States' was certainly intended to have the widest application; although, if the meaning of this section is to turn on forms of expression, it would not apply to the Chief Justice of the Court of Claims at all, because by the act creating the court (Rev. Stat., sec. 1049), 'It shall consist of a chief justice and four judges,' etc. All five of these officers are appointed by the President, confirmed by the Senate, hold their offices during good behavior, take the same oath, have the same jurisdiction, and receive the same salary payable in the same way. It is not open to doubt that the retirement Act was intended to apply to the chief justice as well as to the judges of that court.

I understand that the doubt which led to your question has been suggested by the phrase 'after

having held his commission as such at least ten years.' This, it has been thought, may mean that the commission, under which the judge is serving at the time of his retirement, must have been in force at least ten years. Certainly no such intention is to be extracted from this language without resort to the same technicality which would deny to the chief justice of the Court of Claims the right under this section which the other judges of that court have. The simplest form of expression, and therefore perhaps the most natural, would have been 'resigns after having served at least ten years.' But it is a matter of common knowledge that the object of this statute was not only to offer an additional inducement to enter the judicial service of the United States, but also *to encourage the retirement therefrom of men whom age or infirmity make incapable of further service, some of whom, at the time of the passage of the Act had already been for a considerable time wholly disabled.* If the form of expression I have above suggested had been used, it might have been claimed that actual service for ten years was required, so that the period of past incapacity would be excluded. It was, in my opinion, to avoid this result that the reference to holding the commission was made instead of reference to holding the office or discharging its duties. This intention seems to me clearly to account for the language used, and at the same time to exclude the idea that any significance was meant to be given to the formal written expression of authority which might, for the time being, be evidence of official character. I am wholly unable to conceive any reason which could have led Congress to a consideration of this feature of the subject, especially with respect to judgeships which are exactly alike in every particular except in name. It was being in commission and not holding a particular commission that Congress meant to make a condition."

The principle laid down by Judge Story in United States *v.* Morse (3 Story's Rep., 87), "Where the words of the Statute are loose or obscure and admit of two interpretations, it seems to me that the construction ought to be favorable to the claims of the officer who performs the duties of two independent offices," is also clearly applicable. Judge Benedict

had performed for twenty-four years the duties of a Judge of the Circuit Court in the Southern District, as well as those of District Judge in the Eastern District.

If it is possible to give two constructions to this word "salary" in Section 713, *one* of which shall cause the Judge after his resignation to receive less than he has been receiving for the last twenty-four years, and the *other* of which shall cause him to receive the same that he has been receiving, the latter construction, which is a construction "in favor of the officer," should be adopted.

The construction of the word "salary" in the Statute, so as to include this $1,800, which Judge Benedict for twenty-four years received annually as compensation for his services as Judge of the Circuit Court in the Southern District, is in conformity with the object of the Act. A construction which would exclude it, is contrary to the object of the Act.

Manifestly the object of the Act was that a Judge, who was about to retire after ten years' service, should not have to consider the question of a diminution of his income by his resignation. The intention was that he should receive from the public, after his resignation the same amount yearly, which the public had previously paid him for his Judicial services.

But, unless this $1,800 is to be held to be "salary," Judge Benedict will receive from the public after his resignation $1,800 a year less than the public had paid him for his Judicial services during the twenty-four years before his resignation.

SIXTH POINT.

The definitions that have been given to the term "salary" by the law dictionaries and the decisions of the courts do not require the exclusion from its meaning of this Judicial compensation.

(*a*) Dictionary definitions are as follows:

Bonvier: "A reward or recompense for services performed."

Abbott: "A recompense or consideration made to a person for his pains and industry in another person's business."

Jacobs: The same.

Rapelye & Lawrence: The same.

Stroud: The same.

Wharton: The same.

Webster: "The recompense or consideration stipulated to be paid to a person for services."

Worcester: The same.

The Century: "The recompense or consideration stipulated to be paid to a person, periodically for services."

It could hardly be said that this $1,800 a year was not a *recompense paid to Judge Benedict for Judicial services*. And if so it was "salary." And it was payable to him by law, and hence within not only the spirit but the letter of R. S. § 714.

(*b*) The meaning of the word "salary," has come before some of the State courts for consideration. I comment upon them to show that, even if State Court decisions as to State Statutes were of any authority on this case, these decisions are not against my view.

In Thompson *v.* Phillips, 12 Ohio State Rep., 617, the decision was that, under a section of the Ohio Constitution in which the words "salary" and "compensation" were *both* used, there was a difference in the meaning of the words, as used in that section. But in the Constitution and Statutes of the United States those words are used indiscriminately. The decision in Thompson *v.* Phillips

therefore has no bearing. And even in that decision the "general sense" of the word "salary" is spoken of as "embracing any compensation fixed for an officer"; and this covers the compensation in question.

In Dane *v.* Smith (54 Ala., 49) the language used is "compensation established by law to be paid at stated times."

These payments to Judge Benedict were "established by law"; were "decreed by authority" and were "paid at stated times," according to express Statute.

The State *v.* Murphy, 24 Fla., 33, quotes with approval the definition of "salary" from Bouvier's Law Dictionary as being "A reward or recompense for services performed" (which is the definition that we claim), and holds that the clause of a Florida Statute which said that a County Solicitor "shall be paid Three Dollars *per diem*," gives him a "stated salary." If Three Dollars *per diem* is a Stated Salary, why is not Three hundred dollars a month six times a year a stated salary?

In the decision of Cowden *v.* Huff, 10 Ind., 85, it is said, that, "salaries are the *per annum* compensations to men in official and some other situations." The opinion adds, "See the dictionaries of Richardson, Webster, Bouvier and Wharton," and gives no other authority.

Not one of those dictionaries embodies in its definition any *per annum* idea. I have given two of them and several others above.

Webster's Dictionary embodies in one of its definitions the idea of a periodical payment, but it does not say "annual payment." And Richardson's definition is as follows: "Pay made for services done in stated times or periods of time." He makes not the payment but the service periodical.

Not one of the authorities referred to by the Court supports the definition of a "*per annum* compensation."

(*c*) What distinguishes salary from wages is the official character of the recipient. As it is said in Ely's Political Economy (p. 169), "Labor is remunerated by wages and by salaries, wages being the remuneration of subordinates and salaries of officials."

This latter has come to be a more generally held meaning, viz: that when men speak of "salary" they mean the remuneration for official service. But even this is not a universal use. When Hamlet speaks of killing the slayer of his father while in prayer and thus sending him to heaven, and says "Why! This is hire and *salary*, not revenge!" he did not have any idea of *official* service or of *annual* employment or of time at all.

In the case of Comm. *v.* Butler (99 Penn. State Rep., 542), Judge Sharswood said "According to most approved lexicographers the words 'salary' and 'wages' are synonymous. They both mean the same thing, a sum of money periodically paid for services rendered" * * "If there is any difference between them it is only in the application of them to more or less honorable services. * * "How can it make any difference in which way the compensation is ascertained." And the Court in that case held that a *per diem* compensation was salary.

The opinion of the Court of Claims (Record, fol. 9) uses this language: "The important element of salary is certainty of amount in relation to duration of time." But, as will be seen, this element is not included in any of the definitions of the word which have been given as above by either the dictionaries or the Courts. That this was the *important element* does not seem to have been discovered before the opinion below was rendered. But, if that is an element, important or not, it is not lacking in this case. Judge Benedict was paid three hundred dollars a month for six months of every year for 24 years. And that mode of payment has been declared to make the compensation "salary" by Statutes of the United States as we will proceed to show.

SEVENTH POINT.

The question whether this $1,800 is "salary" under Sec. 714 of the Revised Statutes is not to be determined or affected by decisions of the Courts of a State as to the meaning of the word, where it has been used in the Statutes of that State.

It is to be determined by the Constitution and Statutes of the *United States*. The construction which the Legislative Power of the United States has given to the word should control.

(*a*) The Constitution and the Statutes of the United States use different words to express recompense for Judicial services.

The Constitution uses the word "compensation."

Art. 3, Sec. 1, says "The Judges * * * shall at stated times receive for their services a *compensation*."

"Compensation" for their services is the same as "a recompense for judicial service."

The Statutes of the United States use both the word "compensation" and the word "salary," and they use them indiscriminately. Thus, the Act of September 23, 1889, 1 Stat. at L., p. 72, provided that "There shall be allowed to the Judges of the Circuit Court and other courts of the United States the yearly "*compensation* hereinafter mentioned." Section 554 of the Revised Statutes provided that, "District Judges are entitled to receive yearly *salaries* at the following rates."

In Section 35 of the Revised Statutes the word used is "salary," and in Section 28 the word used is "compensation," as to the amount paid to Representatives. And so in Section 35, the recompense of a Senator is spoken of as "salary," while in Section 45, the same thing is spoken of as "compensation." The same use of the two words occurs in Sections 39 and 41, and in Sections 49 and 51.

The same thing runs through all the Statutes. Thus, in the Appropriation Act of February, 1897, (29 Stats., p. 538) the appropriations are made for "compensation" for officers, who by Statute are

declared to be recompensed by "salary;" as well for pages who are paid by the day "for the time they are actually employed," as for the officers whose salary is paid "annually."

And, furthermore, in the Act creating the Eastern District of New York (13 Stat. at L., p. 428) the only provision with reference to the Judge of that District is that, "The said Judge shall also receive the same *compensation* that is by law provided for the Judge of said Southern District."

(*b*) It is to be noted that neither the word "compensation," nor the word "salary" is used in Section 613 of the Revised Statutes, the wording of that Section being, "At every such term of the Circuit Court the Judge shall *receive the sum* of $300." But surely no one can contend that this form of words expresses any other idea than was expressed by the words "compensation" and "salary," wherever they have been used in the Statutes. The idea intended to be expressed in every case is "recompense paid to a Judge for judicial services."

Let us suppose that Section 613 had read that "at every such term of the Circuit Court the Judge shall receive the *salary* of $300;" or let us suppose that it read "at every such term the Judge shall receive the *compensation* of $300;" instead of reading, as it now does, "at every such term he shall receive *the sum of* $300." All these three forms of expression convey the same idea; namely, recompense for judicial services. And it would be a very strained construction of Section 714 which should hold that the word "salary" in that Section would include what was specified in the first expression, but did not include what was intended in the third form of expression, although conveying exactly the same idea.

EIGHTH POINT.

The opinion of the Court below seems to be that because the amount of this yearly compensation to Judge Benedict for his services as Judge of the Circuit Court in the Southern District was fixed at $300 for each term, not exceeding six, that he should hold in the year, therefore it was not "salary."

But the word "salary" is used in the Statutes of the United States to cover exactly such cases. Thus, in Sections 52 and 53 of the Revised Statutes, the compensation paid to the pages for the Senate and the pages of the House of Representatives is provided for. And it is provided that they shall receive "a *salary* of $3.45 a day each *while actually employed.*" There is no distinction in principle between the payment to these pages of so much a day "while actually employed," and the payment to the Judge of the Eastern District of $300 a month "at every term held by him." The one case is exactly as indefinite as the other. But the compensation to the pages for the services rendered by them *is specifically described in those Sections as "salary," notwithstanding such indefiniteness.* These Sections constitute a Statutory construction of the word "salary," which is a complete answer to the view of the Court of Claims.

The pages might be employed for one day or for three hundred days. How many days they would have to be paid for during the year could not be told till the year was ended. If a page served ten days he would be entitled to so much pay. If he served but five and declined to serve more, he would be entitled to only half as much. But in either case the Statute provided that the recompense to be paid him for his services as page, whatever such services had actually been, was "salary."

Here is a Statutory construction of the word "salary." holding that the recompense to a page, at so much a day, for so many days as he shall be actually employed, is "salary." It follows that

the recompense to a Judge of three hundred dollars at every term held by him is also "salary."

"A salary of $3.45 a day while actually employed." "The sum of $300 at each term held by him." The page's recompense for his services is declared to be "salary." Then the Judge's recompense for his services must also be "salary."

NINTH POINT.

What is the "salary" of a Judge? Manifestly it is the compensation which the public pays to him for his Judicial services rendered to the public. It makes no difference how that money is paid, whether daily, weekly, monthly or yearly. The page who receives $3.45 a day "while actually employed," as specified in Sections 52 and 53 of the Revised Statutes, receives a *salary*, just as much as the clerks, messengers and laborers mentioned in the same sections, who are paid so much a year. To make the meaning of the word "salary" dependent on the mode of payment, would be sacrificing the essential to the form.

Recompense for judicial services is the essential element, and that $1,800 a year has just as much been a recompense paid by the public to Judge Benedict for his judicial services as Judge of the Circuit Court in the Southern District, as has been the $5,000 paid him for his judicial services as Judge of the Eastern District.

TENTH POINT.

The sixth paragraph of the Findings of Fact (Record, fol. 7), is entirely immaterial on the question in this case.

The question whether the Eighteen hundred Dollars which, as stated in the Fifth paragraph was "thus paid annually to the claimant" is properly called "salary" or not, is not in the slightest degree affected by the facts that such payments were made by the Marshal, or were allowed in the Marshal's accounts, or were paid to the Marshal out of the apropriations for defraying the expenses of the Courts of the United States.

(*a.*) The question whether a compensation is, or is not "salary" cannot be affected by the mode of its payment. Congress might change the mode of payment to the Judges of the United States as it pleased—it might order that they should be paid by the Treasury Department or the Department of Justice, by the Marshal or the District Attorney—that they should be paid yearly of monthly or daily, and it would make no difference. The compensation which the Judges received would still be a "salary," and nothing else

(*b.*) Nor can this question be in any way affected by any regulation as to how the disbursing officer shall be repaid, or settle his accounts with the Treasury Department.

(*c.*) Nor can it be affected by considering the Appropriation, against which such payment was charged by the Treasury Department. The character of what Judge Benedict received, whether "salary" or something else, is the same, whatever Appropriation Bill Congress thought fit to use, provide the money for it.

It cannot be argued that this compensation was not "salary" because it was paid out of an appropriation "for the expenses of the United States Courts;" for the reason that the salary of the Judge

and the salaries of the other court officials form part of the expenses of the Court. And they are oftentimes so specifically described in the Statutes.

For instance, in the Appropriation Bill of 1878, for the "Legislative, Executive and Judicial Expenses of the Government." (19 Stat. at Large, p. 318) there is a specific appropriation "for defraying the contingent *expenses* of the Courts *including the compensation of the District Attorney.*"

And in the Sundry Civil Bill of the same year (id p. 346) there is a specific appropriation "for salaries and *other* necessary *expenses* of the Metropolitan Police."

In the Sundry Civil Bill of 1892 (22 Stat. at L. 335-6) there are specified as "*expenses* of the United States Courts" the payment of District Attorneys and assistants and the *salaries* of the United States District Judge, District Attorney and Marshall of the Northern District of Iowa.

Many other citations might be made, but these are abundant to show that the payment of this money to Judge Benedict out of an Appropriation for the expenses of the United States Courts does not tend to show that it was not "salary." Salaries are a part of such expenses.

The Sixth Paragraph of the Statement of Facts is, therefore, immaterial.

ELEVENTH POINT.

If it were suggested that this compensation should not be held to be salary because if it were, it could not be diminished or taken away under Section 613 of the Revised Statutes, I beg leave to call attention to the following opinion rendered by Judge Blatchford on this very question, in answer to a letter addressed to him on the matter by Judge Benedict, the original of which is in my possession.

WASHINGTON, March 10, 1884.

My Dear Judge:

It seems to me that as long as Sec. 613 is in force permitting the Criminal Term to be held by you, your right to the $300 cannot be taken away. It is "compensation" under Art. 3, Sec. 1, for "services" and is not "expenses."

Yours faithfully,

SAML. BLATCHFORD.

Judge Benedict.

This opinion of Judge Blatchford is strongly supported by the case of U. S. *v.* More, 3 Cranch, 159. —Note.

The Justices of the Peace in the District of Columbia were compensated by fees. Congress passed a law abolishing the fees. Held by Cranch, *J.*, that the fees were the compensation fixed by law and that by reason of the 3d Article of the Constitution, a law abolishing those fees could not affect the Justice during his continuance in office. And Judge Marshall concurred.

TWELFTH POINT.

To sum up the matter:

1. There is no reason in equity why this sum of $1,800, which had been paid to Juge Benedict every year for twenty-four years, as a recompense for Judicial services, should be held to have been not "salary," and should, therefore, stop on his resignation.

The continuing of the salary on the retirement of a Judge only makes up in a very small measure for the great inadequacy of the compensation for which the Judges of the United States render their services. Judge Benedict has given to the United States his Judicial services for a period of thirty-three years. In no one of those years has he received as compensation half of what he would have received for services at the bar. He has given to the United States services for which the community would

have readily paid him $150,000 more than he has received from the United States. If it was "just" that he should receive this addition to his salary for extra work which he performed, while he performed it, it is equally just, that, when the Statute says that he shall receive "the same salary" after his resignation during his natural life, that salary should not on his resignation be cut down from $6,800 to $5,000.

No equitable ground can be made for making a distinction between the salary which he received for one part of his Statutory work and that which he received for another part of it.

Even at the best, his remuneration for his long service rendered to the United States will be entirely inadequate.

If there were any doubt as to the proper construction of Sec. 714, that construction should be given which would not reduce the small compensation of a public servant, who has rendered to the public thirty-three years of faithful Judicial service.

(2.) There is nothing in any definition that has been given to the word "salary" by the dictionaries or the courts, which requires that this compensation for judicial service rendered by Judge Benedict should be held not to be "salary."

(3.) Congress has expressly applied the term "salary" to compensations of exactly the same character.

(4.) And unless the Court can think that Congress, in passing Sec. 714 of the Revised Statutes, did not intend that every Judge of the United States who should resign after ten years' service, should thereafter receive during his life the same amount annually which he was, at the time of his resignation receiving as compensation for his judicial services, the decision of the Court of Claims should be reversed and a decree rendered in favor of the petitioner.

ROBERT D. BENEDICT,
Counsel for Appellant.

In the Supreme Court of the United States.

CHARLES L. BENEDICT, APPELLANT,
v.
THE UNITED STATES.
No. 435.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The claimant was duly appointed in the month of April, 1865, by the President of the United States, judge of the district court of the United States for the eastern district of New York, and occupied such position until the 20th of July, 1897, when, having attained the age of 70 years and upward, he resigned his office, pursuant to section 714 of the Revised Statutes of the United States.

During said period, and pursuant to the act of February 7, 1873, the provisions of which are now embodied in sections 613 and 658 of the Revised Statutes of the United States, the claimant held the six terms of the

circuit court of the United States for the southern district of New York established in said act exclusively for the trial and disposal of criminal cases, from the date of the passage of the act of February 7, 1873, to the time of his resignation from office, and received for holding each of said terms the sum of $300, the same being paid to him by the United States marshal for the southern district of New York, pursuant to sections 613 and 597, Revised Statutes of the United States.

The same was paid upon a voucher in substance as follows:

> UNITED STATES OF AMERICA,
> *Southern District of New York.*
>
> I, Charles L. Benedict, district judge of the eastern district of New York, hereby certify that I have held the circuit court of the United States for the southern district of New York at the —— term thereof, provided for by section 613 of the Revised Statutes of the United States, and that I am entitled to receive therefor the sum of $300, as provided in said section.
>
> (Signed) CHARLES L. BENEDICT
> (and dated).
>
> Received of —— ——, United States marshal for the southern district of New York, the sum of $300 in full of the above account.
>
> (Signed) CHARLES L. BENEDICT.

Such payments to the claimant by the marshal were from time to time allowed in the marshal's accounts and paid to him out of the appropriations for defraying the expenses of courts of the United States. The total amount thus paid annually to the claimant was $1,800.

During the year previous to the claimant's resignation he received the said $1,800 for that year, in accordance with the provisions of sections 613, 658, and 597 of the Revised Statutes of the United States, and also the salary of $5,000 payable to him, as provided by the act of Congress of February 24, 1891 (24 Stat. L., 783), out of the appropriation to pay the salaries of district judges of the United States.

Since his resignation the claimant has received as salary, pursuant to section 714 R. S., the sum of $5,000 per annum only, his claim for the payment of $1,800 annually in addition having been rejected by the Auditor, to whom it was presented. Accordingly, on April 14, 1899, the claimant brought suit in the Court of Claims for the sum of $3,150, alleged to be the amount of salary still due him under the provisions of said section 714 R. S. Judgment was rendered by the court in favor of the defendants, dismissing the petition. From that judgment the claimant has made this appeal.

ARGUMENT.

The counsel for claimant at the outset states the question involved in this case to be whether the appellant shall, by reason of his resignation from the office of district judge of the United States—

> lose $1,800 a year for the rest of his life, *or* receive from the United States the same compensation which had been for over twenty years paid him for his judicial services.

This is a most moving presentation of the situation. It gives a pathetic view of the result which must follow

upon the success of the defense—the determining that Judge Benedict, having grown old in distinguished and honorable service of the Government, must in his last years suffer diminution of his income by reason of the resignation of his office made imperative, doubtless, by failing health,—which one would rather not have in mind in discussing this case.

And so I much prefer the more coldly exact statement of the issue, also made by counsel for claimant, which was commended by the court below for its clearness and terseness, namely:

> Was this $1,800 paid to Judge Benedict yearly for twenty-four years and provided for by section 613, Revised Statutes of the United States, a part of his salary which was by law payable to him?

Counsel for claimant has treated this question as though it involved the determination of the general definition of the term "salary," and has sought to establish that by this term is meant any reward or recompense for services rendered, citing decisions going to show that salary and wages are synonymous, and that in some cases a salary may be mere *per diem* compensation. It seems to me that a discussion of these authorities and a consideration of this view of the subject are not instructive in arriving at a determination of the question here in issue. Conceding that in some instances wages and salary express practically the same thing and that the *per diem* pay of a page of the House of Representatives is a salary, because so designated in the Revised Statutes of the United States, it does not appear to me that these facts have any true bearing upon the question. The

salary which we are called upon to inquire into in this case certainly stands upon a higher plane than the salary, if such it be, of a page of the House of Representatives, for instance. It is the salary of a judge of a United States court that is here under consideration, and it would seem that it may fairly be described as—

> Not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense of an annual or periodical payment for services, a payment depending on the time and not on the amount of the services rendered. (*Thompson* v. *Phillips*, 12 O. St., 617–18.)

An examination of the decisions in which the definition of the word salary has been considered will disclose that this limited or more dignified view of the term has been widely adopted.

> The term salary denotes a recompense or consideration to be paid a public officer for continuous as distinguished from particular services, and may be denominated annual or periodical wages or pay. (*Landis* v. *Lincoln Co.*, 31 Ore., 427.)
>
> As to officers having salaries the rule is believed to be universal that their compensation is established—"decreed by authority and for permanence," and that such salaries are paid to them at stated times. (*Dane* v. *Smith*, 54 Ala., 49.)
>
> The rule of fixed compensation by time that constitutes the earmark of salary. (*State* v. *Murphy*, 24 Fla., 33.)

In *Castle* v. *Lawler* (47 Conn., 345,) the compensation of a tax collector was adjudged to be a salary because—

> It is a fixed sum which he is to receive for his services as collector during his term of office, which is one year; and that makes it salary.

> Salaries are a per annum compensation to men in official and some other situations. (*Cowdin* v. *Huff*, 10 Ind., 85.)

In *People* v. *Myers* (42 Albany Law Journal, p. 332,) the words salary and wages are carefully considered and distinguished and a number of authorities are cited. In the course of its discussion of the question the court uses the following language:

> "Wages earned" is an apt expression in regard to laborers who are only entitled to pay for services actually rendered, but is entirely inappropriate when used concerning public officers or clerks who receive annual salaries which are not due until the expiration of the year, and are entitled to be paid so long as they hold their offices or places, without regard to the services rendered.

This definition of salary as an annual or periodical compensation for services is found in nearly every dictionary, whether law or general.

> Salary. Money paid at regular periods for services rendered. (English (1889); Abbott; Tomlins; Jacobs.)
>
> The per annum compensation to men in official and in some other positions. (Anderson.)
>
> An annual compensation for services rendered. A fixed sum to be paid by the year for services. (Black; Burrill.)
>
> Stipend or annual allowance. (Rapalje & Lawrence; Wharton.)
>
> The recompense or consideration stipulated to be paid to a person periodically for services. Usually a fixed sum to be paid by the year, half year or quarterly. (Century.)

> A periodical allowance, as a compensation to a person for his official or professional services, or for his regular work. (Standard, 1895.)

Webster uses the following definition amongst others:

> Annual or periodical wages or pay.

Unquestionably these definitions of salary as applied to the compensation of the higher grade of public officials in the Government service are in accordance not only with the common acceptation of the meaning of the term, but with exact facts as well. The salaries of such officials will invariably be found to be fixed in amount and for a definite period of continuous, not particular, service; payable at stated times without reference to the amount, but only to the duration, of service. Without exception, too, such salaries are annual.

In determining, then, what was the salary of Judge Benedict which was by law payable to him at the time of his resignation—the salary which he received during the year previous to his resignation,—we look for an official compensation received by him having the characteristics above enumerated; and we find it in the $5,000, which was admittedly salary.

Its amount had been fixed by the act of February 24, 1891 (1 Supp. R. S., chap. 287, p. 896), in the following language:

> That the salary of the several judges of the district courts of the United States shall hereafter be at the rate of $5,000 per annum.

It was payable in monthly installments, pursuant to paragraph 4, chapter 130, 1 Supplement Revised Statutes, page 320.

It was payable without reference to the amount of official service rendered by him and, indeed, though he rendered none at all. It was secured to him during his natural life upon a condition that only made it doubly sure. Finally it was protected from all possible danger of diminution during his term of office by the Constitution of the United States.

Now, according to the contention of the claimant, $1,800 was added to his official salary by the act of February 7, 1873, and became thereafter a part of that salary. But it is clear that it could not thus be added to and become a part of the original official salary of Judge Benedict, unless, like that salary, it were itself a fixed annual compensation; and yet it was not that in any sense. It was not paid for annual official services, nor even with reference to any period of time. It was, indeed, in no respect a fixed sum of $1,800, but was ascertained by adding together six $300 payments, made during the year, to be sure, but each of which was a separate and distinct payment, having no dependence upon nor relation to any of the others. Each of these payments was a lump sum paid in consideration of the performance of a particular task—the holding of a criminal term of the southern district of New York. The duration of these various terms thus held during the year was, in the nature of things, indefinite and variable. The time thus employed might vary from a few days to two or three weeks, and yet the compensation was in each case the same.

It had not that quality of "fixed compensation by time that constitutes the earmark of salary."

The distinction between this compensation and the official salary of claimant is made most strongly apparent by considering his relations to each at the time of holding one of these criminal terms of the southern district of New York. While holding such term he was performing a service for which he was entitled to receive the sum of $300, and during that period his entire time was devoted to the earning of this particular sum; yet meanwhile his salary of $5,000 was going on without interruption, although for the time being he was performing no services whatever of which the same was compensation. The salary was his by virtue of the lapse of time, being appurtenant to his official position. The $300 was his by virtue of performing a particular task, and he was not entitled to the same until that task was completed.

Again, this $1,800 alleged salary had not the element of certainty. In order that the claimant might receive the same during the year he must hold each one of the six terms already referred to; but the holding by him of these terms rested upon several contingencies. To begin with, they were not a part of his absolute official duty at all. By the terms of the statute, section 613, Revised Statutes, they—

> may be held by the circuit judge of the second judicial court and the district judges for the southern and eastern districts of New York, or by any one of the said three judges.

Hence Judge Benedict could hold one of these terms only by reason of some mutual agreement between himself and the other two judges qualified to hold the same

term, and clearly, if this arrangement were not made, but the term were held by the three judges or by one of the other two, as authorized by the statute, he would not be entitled to the $300 payment. Again, he might be prevented from holding one or more of these terms by sickness or other incapacity, in which case, of course, he would not receive the payment therefor. Moreover, these terms are created by statutory enactment, and by the same token are subject to change. If Congress in its wisdom should lessen the number of these terms, of course the amount of compensation to be derived each year by the claimant through holding them would be correspondingly lessened. And, furthermore, there would seem to be no limitation upon the power of Congress to diminish the amount of these payments. In fact, no such limitation can be claimed except by begging the very question which we are here debating—whether such payments are a part of the official salary of the claimant. But if the conclusion be reached that this alleged $1,800 yearly salary is subject to diminution and even extinction during any year, we are confronted with an anomalous condition of affairs. The claimant's salary would then consist of two parts—one fixed and protected from diminution by the Constitution of the United States, and the other contingent and variable and unprotected by this constitutional guaranty.

The claimant urges, to be sure, that as a matter of fact he has held every one of these terms since the passage of the act by which they were created up to the time of his resignation, a period of twenty-four years. But this, it

seems to me, only emphasizes the above argument. It is a matter of congratulation to Judge Benedict that he was thus fortunate in the continuance of his health and strength, but it is evident that it was because of his unusually vigorous constitution thus evinced that he was enabled to receive during all those years this so-called salary, and that fact would seem to make the same, unlike the ordinary judicial salary, contingent upon good health instead of good behavior.

And here an incongruity might be suggested by way of final illustration of the unsoundness of the claimant's contention. Suppose, as might very well be, that the claimant, after holding every one of these terms for twenty-three years, should, in the following year, have been wholly prevented from holding one of them and at the close of the twenty-fourth year been absolutely obliged, by continuous ill health, to retire from his official position. In that event, since this $1,800 had not been received by him during the year previous to his resignation, the salary now claimed by him would be but $5,000, despite the twenty-three years during which he had received, as he contends, $6,800 annual salary.

Counsel makes the inquiry: "If the sum thus paid to Judge Benedict every year was not 'salary,' what was it?"

This seems to be a fair question, although it might reasonably be met with the answer that if it is not shown to be salary it is immaterial for the purposes of this action what it is. But to answer the question. If we look to the statute under which this payment is made it is not at all certain in the light thus given that it is not in

the nature of a reimbursement for expenses. The statute seems to carefully refrain from describing it as compensation. But it does say that it shall be paid in the manner now prescribed by law for the payment of expenses of another district judge while holding court in said district. Section 597 Revised Statutes, United States, contains the provision here referred to, and in accordance therewith each of these $300 payments has been made to the claimant precisely as though they were intended for payment of his expenses, being made by the United States marshal for the southern district of New York upon the voucher presented to him by the claimant certifying that the term had been held by him and containing his receipt for the payment. The fund out of which these payments were made was the appropriation for defraying the expenses of the courts of the United States.

These facts are not presented as forming a conclusive answer to the question of counsel, but they certainly do squint toward the conclusion that in part at least this payment was mere reimbursement for expenses. But, treating these payments as compensation purely, it nevertheless by no means follows that they must receive the definition of "salary." There seems to be no reason why they should not be treated as extra allowances or compensation for extra services performed by the judge of the eastern district of New York and authorized by law to be paid; just such compensation, we find, as is contemplated by section 1765, Revised Statutes.

It is very strenuously urged in behalf of the claimant that it is a hardship and that an injustice will be done him if it be held that he is entitled on his retirement to an income from the Government $1,800 less than was paid him while occupying his official position. If this results from the clear meaning of the law applicable to the case there is, of course, no legitimate ground for complaint, but in any event a plea of injustice and hardship must always have its weight and should be squarely met, if possible.

It seems to me that the facts do not fairly sustain any such proposition. It is true, as urged, that if the $1,800 in question was not a part of the salary of Judge Benedict, he must choose, in contemplating retirement, between a diminution of his income on resigning his office or a continuance in the same beyond the time when he is entitled by law to retire. But the answer to this is that in giving up the $1,800 he also lays down the burden which accompanied it. As already pointed out, while his undisputed salary of $5,000 is payable to him irrespective of the amount of work which he is able to perform, and even though incapacitated by illness to perform any services, yet in order that he might be paid this $1,800, he was forced to hold each one of the six terms specified. And at his age, and with his undoubted physical infirmities, he might well prefer to relieve himself of the extra work thus laid upon him by retirement upon the same salary as is payable to every other district judge throughout the United States on retiring. It certainly seems very like a fair state of things that on resigning his

office and being relieved absolutely from all official services, he should receive exactly the same amount that any one of his brother judges receives in the same honorable retirement.

The Court of Claims held that this extra compensation was not a part of the salary "by law payable" to Judge Benedict when he retired. It seems to me that this decision should be sustained.

LOUIS A. PRADT,
Assistant Attorney-General.

BENEDICT v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 433. Argued January 15, 1900. — Decided February 26, 1900.

Extra compensation received by a District Judge for holding court outside of his own district is no part of his official salary, or recoverable as such under the provisions of the retiring act.

THIS was a petition by the late District Judge for the Eastern District of New York, for his retiring salary, under Rev. Stat. § 714, at the rate of $6800 per annum, which the petition avers was the salary which was by law payable to him during the year previous to his resignation. The petitioner acknowledges the payment of $5000 and claims a residue of $1800, to which he avers himself to be justly entitled.

Upon hearing the case and upon the consent of parties, the Court of Claims found the following facts:

"First. The petitioner, Charles L. Benedict, is a citizen of the United States, of lawful age, and resides at Dongan Hills, Staten Island, in the city of New York, and State of New York.

"Second. In the month of April, 1865, the petitioner was duly appointed by the President of the United States Judge of the District Court of the United States for the Eastern District of New York.

"Third. The petitioner duly entered on the duties of his office, and duly performed the same until the year 1897, during which, and on or about the 20th of July, 1897, he resigned his office, having then held his commission as judge of said court for more than ten years, and having attained the age of 70 and upward.

"Fourth. Since the passage of the act of February 7, 1873, the petitioner has held, under the provisions of that act and the Revised Statutes, to wit, sections 613 and 658 of the Revised Statutes, the six terms of the Circuit Court of the United States for the Southern District of New York, referred

to in said statutes, in every year, and has received for holding each of said terms the sum of $300; the same being paid to him by the United States marshal for the Southern District of New York, pursuant to sections 613 and 597, Revised Statutes.

"Fifth. That the same was paid upon a voucher in substance as follows:

(Omitted.)

"The total amount thus paid annually to the plaintiff was $1800.

"Sixth. That such payments to the petitioner by the marshal were from time to time allowed in the marshal's accounts and paid to him out of the appropriations for defraying the expenses of the courts of the United States.

"Seventh. During the year previous to the petitioner's resignation he received the said $1800 for that year, in accordance with the provisions of sections 613, 597 and 658, Revised Statutes, as above set forth, and also the salary of $5000, payable to him, as provided by the act of Congress of February 24, 1891, 26 Stat. 783, out of the appropriation to pay the salaries of District Judges of the United States.

"Eighth. During the year since his resignation petitioner has only received as salary the sum of $5000, which sum has been received by him without prejudice to the claim which he makes in this proceeding.

"Ninth. The petitioner presented to the auditor of the State and other departments a bill for the amount of his salary claimed by him herein to be remaining due and unpaid, and made claim on the auditor for the payment of said bill, but the auditor refused to audit or approve the said bill, and no part of the said $1800 has been paid to him."

The petition was dismissed, (34 C. Cl. 388,) and petitioner appealed to this court.

Mr. Robert D. Benedict for appellant.

Mr. Assistant Attorney General Pradt for appellees.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

By Revised Statutes, sec. 714, "when any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation."

In April, 1865, petitioner was appointed by the President, Judge of the District Court of the United States for the Eastern District of New York, and served as such until July 20, 1897, when he resigned his office, having then held his commission for over thirty years, and attained the age of seventy years and upwards. The salary of all District Judges was fixed by the act of February 24, 1891, c. 287, 26 Stat. 783, at the rate of $5000 per annum. There is no question made but that petitioner was entitled to this amount, and that it has been paid him.

The controversy arises over the proper construction of the act of February 7, 1873, reproduced in Rev. Stat. §§ 658 and 613. By section 658 it is enacted that "the regular terms of the Circuit Courts shall be held in each year, at the times and places following: . . . in the Southern District of New York, at the city of New York, . . . exclusively for the trial and disposal of criminal cases, and matters arising and pending in said court, on the second Wednesday in January, March and May, on the third Wednesday in June, and on the second Wednesday in October and December;" and by section 613 it is provided that "the terms of the Circuit Court for the Southern District of New York, appointed exclusively for the trial and disposal of criminal business, may be held by the Circuit Judge of the Second Judicial Court (Circuit) and the District Judges for the Southern and Eastern Districts of New York, or any one of said three judges; and at every such term held by said judge of said Eastern District he shall receive the sum of three hundred dollars, the same to be paid in the manner now prescribed by law for the payment of the expenses of another District Judge while holding court in said district."

The facts are that, after the passage of this act of February 7, 1873, petitioner held each year the six terms of the District

Court of the United States for the Southern District of New York, referred to in the statute, and received for holding each of said terms the sum of $300, amounting in all to $1800 per annum. Petitioner now insists that this was a part of the salary which was by law payable to him at the time of his resignation, within the meaning of the retiring act, sec. 714, and should, therefore, be added to the $5000 per annum admitted to be due him.

The case in reality turns upon the meaning of the word "salary," as used in section 714. The word "salary" may be defined generally as a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered. *Thompson* v. *Phillips*, 12 Ohio St. 617; *Landis* v. *Lincoln County*, 31 Oregon, 427; *Dane* v. *Smith*, 54 Alabama, 49; *State* v. *Murphy*, 24 Florida, 33; *Castle* v. *Lawler*, 47 Conn. 345; *Commonwealth* v. *Butler*, 99 Penn. St. 542. As applied to District Judges in general, and indeed to every District Judge except the Judge of the Eastern District of New York, it doubtless refers to the salary of $5000 fixed by the act of February 24, 1891. Such salary is an annual stipend, payable in sickness as well as in health, for duties much more onerous in some districts than in others, and regardless of the fact whether such duties are performed by the Judge in person, or by the Judge of another district called in to take his place. It is a compensation which cannot be diminished during the continuance of the incumbent in office, and of which he cannot be deprived except by death, resignation or impeachment.

Wholly different considerations apply to the compensation provided for by section 613. To entitle the Judge of the Eastern District of New York to the $300 per term, provided for by that section, it is necessary that the term be actually held by him, when he is paid for his services in the manner provided by law for the expenses of a District Judge holding court in another district than his own. He may hold but one term a year, for which he would receive $300. He may hold three terms, for which he may receive $900, or he may hold the entire six terms and receive $1800. Such compensa-

tion is a variable quantity, dependent upon the number of terms held by the Judge. Upon the theory of the petitioner, if he had held but one term during the year previous to his resignation, he would be entitled to but $300 in addition to his regular salary of $5000. The fact that he was able to hold the entire number of six terms for the twenty-four years preceding his resignation is a tribute to his industry, faithfulness and capacity, as well as to his good health, but it does not affect the question in a legal point of view. This compensation was not only for services actually performed, but was subject to be diminished or taken away at the will of Congress. It was something entirely distinct from the salary paid to him as Judge of the District Court for the Eastern District of New York, but was in fact, as was held by the Court of Claims, extra pay for extra work performed — for particular as distinguished from continuous services.

We are all of opinion that the judgment of that court was right, and it is therefore *Affirmed.*

MR. JUSTICE MCKENNA did not sit in this case.